

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA,
ex rel. JON H. OBERG,

Plaintiff,

V.

NELNET, INC., *et al.*,

Defendants.

CIVIL NO. 1:07-CV-960

**MEMORANDUM IN SUPPORT OF RELATOR'S
MOTION TO MODIFY UNSEALING ORDER TO UNSEAL
AND PERMIT SERVICE OF THE FIRST AMENDED COMPLAINT**

Qui tam relator Jon H. Oberg (“Relator”) filed the Complaint in this action on September 21, 2007. Pursuant to 31 U.S.C. § 3730, the action was filed under seal. The time under seal was repeatedly extended at the government’s request.

On August 24, 2009, nearly two years after the case was filed, the government filed a notice that it would not intervene in the action. With that notice, the government submitted a proposed order unsealing the complaint and directing Relator to serve the complaint. That same day, Relator filed his First Amended Complaint. Because there had been no prior amendments, and no responsive pleadings had been filed, the filing was of right pursuant to Rule 15; no action by the Court was required. *See* Fed. R. Civ. P. 15(a)(1)(A) (permitting a party to “amend its pleading once as a matter of course . . . before being served with a responsive pleading”). Thus, the First Amended Complaint became the effective complaint in the action.

On August 26, 2009, the Court signed the government's proposed order providing that "the seal be lifted on the *complaint* and served upon the defendants by the relator." Order, ¶ 1 (emphasis added). Because the First Amended Complaint had previously been filed as a matter of right pursuant to Rule 15(a)(1)(A), however, it is the operative complaint in the action and is the proper complaint to be served on the defendants and answered by them. An amended complaint "supersedes the original and renders it of no legal effect." *Young v. City of Mount Ranier*, 238 F.3d 567, 572 (4th Cir. 2001) (quoting *Crysen/Montenay Energy Co. v. Shell Oil Co. (In re Crysen/Montenay Energy Co.)*, 226 F.3d 160, 162 (2d Cir. 2000) (internal quotation marks omitted)); see also 6 Charles Alan Wright et al., *Federal Practice & Procedure* § 1476 (2d ed. 1990) ("A pleading that has been amended under Rule 15(a) supersedes the pleading it modifies and remains in effect throughout the action unless it subsequently is modified. Once an amended pleading is interposed, the original pleading no longer performs any function in the case.").¹

Accordingly, in order to permit service of the proper complaint and clarify the docket, Relator respectfully requests that the Court modify its Order, *nunc pro tunc*, to expressly lift the seal with regard to the First Amended Complaint filed on August 24, 2009 and require service of that First Amended Complaint as opposed to the now-superseded original Complaint. A proposed order granting this relief is submitted herewith.

¹ Relator's counsel originally understood that the First Amended Complaint was unsealed and was prepared to serve the First Amended Complaint, but was advised to the contrary by the Clerk's Office.

Respectfully submitted,

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September 11, 2009

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11th day of September, 2009, a true and correct copy of the foregoing Memorandum in Support of Relator's Motion to Modify Unsealing Order to Unseal and Permit Service of the First Amended Complaint was electronically filed with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

Gerard Mene, Esq.
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And I hereby certify that I will send the document via first class mail, postage prepaid, and by facsimile to the following non-filing user:

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Civil Division
Post Office Box 261
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